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IN THE

# Supreme Court of the United States

October Term, 1959

No. 762

MARY HELEN BURTON,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA.

## PETITIONER'S REPLY BRIEF.

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### A. Introduction.

The controlling impact of *Jones v. United States* (No. 69, decided March 28, 1960), upon petitioner's standing on motion to suppress evidence is conceded by the Government. (Br. in Opp. 5.) By this concession an essential basis of the decision below is admittedly destroyed.

The Government also apparently concedes, by not denying, petitioner's contention that the arrest was illegal. On this aspect of the case the Government would assert—contrary to petitioner—that a decision upholding the legality of the arrest was not involved in the opinion below. In response we quote directly from the opinion.

> "The Williams case, of course, is not controlling on this Court. But even to make it persuasive, we would be required to find (a) *an illegal arrest;* (b) an illegal search, or the threat thereof; (c) evidence introduced against appellant as a result or product of

(a) and (b). *All three essential elements are missing on the record before us.*" (Italics supplied.) (Pet. App. p. 5.)

The Government, however, would avoid the normal consequences of these concessions and create a back safety door to the *Jones* decision by an unusual application of the abandonment doctrine.

We submit for the Government to apply the abandonment doctrine to the facts of this case is tantamount to the Government arguing that the production of evidence by illegal means is irrelevant and immaterial. In fact, the Government virtually states this at one point in its brief saying,

> "Whether the arrest was legal or illegal, the officers had the right to pick up an envelope that was lying on the ground in their plain view." (Br. in Op. 6.)

Without repeating the arguments heretofore made on this aspect of the case (Pet. 18-21 incl.) we would herewith present what we believe to be essential errors in the Government's argument. However, before so proceeding we specifically direct this Court's attention to a serious omission[1] in the Government's statement of the case, for

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[1]In addition to the omission noted above the Government makes the following error in its statement of the case—on page 2 appears the following: "There had also been a search of petitioner's apartment, but the evidence uncovered there was not involved in the count on which petitioner was convicted." This statement is unequivocally incorrect in its identification of the apartment as petitioner's. There is absolutely no evidence that petitioner had any connection with the apartment other than having entered it with her co-defendant (whom the arresting officers said had the key) twenty minutes before she was arrested. Throughout the proceedings petitioner emphatically denied all ownership or proprietary interest in the apartment. We note this error to dispel at once any unfavorable inference which might arise therefrom.

we believe this omission is reflected in the Government's statement of the question involved and necessarily underlies its argument. In the Statement the Government fails to mention the *fact*—stipulated to at the trial [C. 54, R. 204-206]—that petitioner was "arrested" (not "accosted" as stated by the Government in its statement of the question presented) as she *approached* the car.

**B. Essential Errors in the Government's Argument.**

1. The Government argues that it makes no difference whether or not the action of the officers producing the evidence was illegal. We disagree with the Government. The whole question is whether or not the Fourth and Fifth Amendments require the exclusion of evidence produced by illegal governmental action. Thus the question is whether or not the evidence was produced or procured by governmental illegality. If the evidence is not produced or procured by illegal governmental action, or the illegality was totally collateral to the production of the evidence, then of course the Fourth and Fifth Amendments are not involved. This leads to a two step analysis:

a. Was there illegal governmental action?

b. Did this illegal governmental action produce the evidence?

Where the answer to both the above questions is affirmative the Fourth and Fifth Amendments require the exclusion of the evidence.

*Work v. United States*, 243 F. 2d 660; *Williams v. United States*, 237 F. 2d 789; *Nueslein v. District of Columbia*, 115 F. 2d 690; *United States v. Setaro*, 37 F. 2d 134.

If the answer to either or both of the above questions is in the negative there is no violation of the constitutional protection. Thus in *Lee v. United States*, 221 F. 2d 29, there was no illegal act by the Government. This is also the rationale of *Abel v. United States* (No. 2, decided March 28, 1960).

The case of *Hester v. United States*, 265 U. S. 57, relied on by the Government, involved a mere possible trespass by the officers—as distinguished from the illegal arrest in this case—which was totally collateral to the production of the evidence, and accordingly, since the answer to the second question was negative, it was unnecessary for the Court to decide the first question.

For this reason we believe the *Hester* case is totally distinguishable from the case at bar. Here there was an illegal act by the Government which clearly produced the evidence. For this reason the holding by the Court below sustaining the introduction of the evidence creates a clear conflict in the circuits on an important federal question.

2. The Government in its argument takes the position that there was an abandonment of evidence and therefore the illegal governmental act is immaterial. Again we disagree with the Government. The Government's argument assumes the very point at issue, namely, may the Government constitutionally rely on abandonment where the act involved is the immediate result and product of illegal governmental activity. In other words, the constitutional question is totally sidestepped by the Government's argument for it assumes the very question at issue. We believe the *Work* and *Williams* cases hold that where illegal governmental activity produced the act in question the Government may not constitutionally rely upon an abandonment doctrine.

3. An additional error of the Government's argument in assuming abandonment is that under the facts of this case the evidence of abandonment necessarily rests upon the presumption that the evidence was intentionally and voluntarily discarded. Abandonment is distinguished from all other modes of parting with property "by its essential characteristic of *voluntary relinquishment, made or done by the owner without being pressed by any necessity, duty or utility to himself,* but simply because he no longer desires to possess the thing." (Italics supplied.) (Abandonment 1 C. J. S. p. 5.)

In this case, unlike the *Hester* case, there was no visible, voluntary act of throwing but merely evidence that an object fell to the ground. This falling or dropping could be from fright (the sudden arrest with drawn gun and flashing lights). The act itself of dropping is neuter as to voluntary character and therefore nonevidential of abandonment. To assume or presume abandonment under these facts is itself a violation of the constitutional protections. *Tot v. United States,* 319 U. S. 463, 87 L. Ed. 1519.

Thus whether or not the abandonment doctrine may be constitutionally relied on by the Government, the facts of this case constitutionally prohibit the establishment of the facts of abandonment.

4. The Government argues that there is no conflict between this case and the *Work* case. We disagree. The Government's argument on this phase of the case is based upon the two-fold premise that (a) the evidence was not obtained as a result of an illegal entry into a dwelling, and (b) that objects dropped or hidden within the "curtilage" are within the constitutional protection, but that objects not dropped within the defendant's "curtilage" are

not in an area protected by the Fourth Amendment. (Br. in Opp. 6-7.) To merely restate this argument is to destroy it:

A person is not protected by the Fourth Amendment, but a dwelling is; therefore, unless a person is within the "curtilage" he is not protected by the Fourth Amendment.

As we read this argument it results in the deletion of the word "person" from the Fourth Amendment, and makes "houses" the sole area protected by the amendment.

5. The Government asserts there is no conflict between this case and the *Williams* case, in that the defendant in the *Williams* case did not drop the article until after he was arrested. The Government forgets the stipulation that petitioner was arrested as she approached the car and that this arrest took place before the object was dropped. We submit the cases are in direct conflict.

However, assuming an *elengentia juris* dictinction as to the exact instant of arrest as asserted by the Government, we must still contend its invalidity. This Court has clearly indicated a determined unwillingness to reduce constitutional protection to meaningless or split second distinctions. See *Boyd v. United States,* 116 U. S. 616, 635.

We must disagree with the Government's argument on this aspect of the question involved and characterize it as meaningless hypertechnicality.

6. The Government's argument on abandonment appears to be in essential contradiction with the case of *Jones v. United States* (No. 69, decided March 28, 1960). As we read the *Jones* case where possession proves guilt, possession gives standing to suppress evidence. To apply abandonment to this area seems to undermine the essen-

tial reasoning of the *Jones* decision, for abandonment relates to possession; to allow the Government argument again permits the Government to be given the benefit of inconsistent positions. We submit under the facts of this case if petitioner had possession for the purposes of conviction she is entitled to avail herself of the remedies designed for one in her position. *Jones v. United States, supra.*

## Conclusion.

In view of the concessions by the Government and the weakness of the argument upon which it has elected to stand, it is submitted that this matter should be set down for argument and the writ of certiorari granted with directions to reverse the conviction.

Respectfully submitted,

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